SUPREME COURT, U. S.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 536

PRESTON CORPORATION, PRESTON PUBLIC SERVICE CORPORATION, and JANE GREER KELLY, *Petitioners*,

v.

RICHARD AUBREY RAESE, *Respondent*.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Petitioners[1] pray that a writ of certiorari issue to review the judgments of the United States Court of Appeals for the Fourth Circuit, entered in the above matter on April 18, 1967 (R. 41, 92).

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[1] The action below was commenced against both petitioner Jane Greer Kelly and respondent Richard Aubrey Raese individually and in their claimed capacities as fiduciaries and custodians of their minor children, Richard Greer Raese and John Reeves Raese and the children were also named as parties defendant in that action.

OPINIONS BELOW

The opinion of the District Court of the United States for the Northern District of West Virginia (I-151a)[2] is reported at 236 F. Supp. 135 and is printed in the Appendix hereto, *infra* p. 8a. The opinion of the Court of Appeals has not been reported and is printed in the Appendix hereto, *infra*, p. 1a.

JURISDICTION

The judgments of the Court of Appeals were entered on April 18, 1967 (R. 41, 92); pp. 6a, 7a *infra*. Rehearing was denied on May 30, 1967 (R. 56, 107); p. 8a *infra*. The jurisdiction of this Court is invoked under 28 U.S.C. Sections 1254(1) and 1232.

QUESTIONS PRESENTED

The real question presented by this petition is whether a federal court should, after nearly seven years of almost continuous delay, be required to take jurisdiction of an interpleader suit brought to settle an even longer dispute over claimed adverse rights stemming from the dissolution of a marriage and hence to put an end to the maintenance of further vexatious and costly litigation between the adverse claimants.

Petitioners Preston Corporation ("Preston"), as interested stakeholder, and Preston Public Service Corporation ("Public Service"), the owner, pursuant to a reorganization of electric and telephone distribution facilities being operated in West Virginia, brought the action to resolve mutually exclusive claims to custody and control of substantial equity interests in the

[2] The references to the portions of the certified transcript of record contained in appendices filed by the petitioners and respondent in the Court of Appeals are respectively designated I... and II...

utility properties of the children of divorced parents alleged to have resulted from conflicting state court orders and decrees obtained by the parents.

The mother, Petitioner Jane Greer Kelly, who controls Preston, asserted her claim by answer to the complaint on the basis of orders entered by a Florida state court which granted her petition for divorce. The father, respondent Richard A. Raese, was not directed to nor did he file an answer to the complaint, but his claim to guardianship of the children may be evidenced by his allegations in an action he instituted in a West Virginia state court shortly before this interpleader suit was commenced.

Dismissal of the interpleader action by the district court following its transfer to the district of respondent's residence was principally predicated on the absence of a *bona fide* fear that the stakeholder would be subjected to vexatious claims from its controlling stockholder; yet the Court of Appeals acknowledged the presence of a clear dispute between the alleged adverse claimants. But it is patently evident that the court's decision was strongly influenced not only by the relationship between the adverse claimants but by its prejudgments of the merits of independent but related claims which were asserted against the respondent Raese personally for damages alleged to have been suffered by the petitioning corporations and by a demand for relief made by petitioner Mrs. Kelly's cross-claim—prejudgments made in the absence of the receipt by the trial court of any evidence in support of or in opposition to their claims.

The questions which should be considered are:

1. Whether the essential purpose of interpleader—the avoidance of vexatious litigation by the resolution of

adverse claims to a *res* which has been deposited in interpleader can be frustrated by a federal court as within its discretion to hear or dismiss;

2. Whether the refusal of a federal court to entertain an interpleader action in which jurisdictional requirements have been met and where there has been a history of incessant delays and the refusal to require adverse claimants to plead to a complaint in interpleader in substance denies due process to parties seeking to resolve such disputes; and

3. Whether independent but related claims asserted by the petitioners against the respondent after transfer of the action to the residence of the latter made upon his motion, may be dismissed out of hand as not bearing "close scrutiny" or as being "further suspect" solely upon the allegations contained in the complaint and cross-claim.

STATUTES AND RULE INVOLVED

Section 1335, 28 U.S.C.:

> *Interpleader.* (a) The district courts shall have original jurisdiction of any civil action of interpleader or in the nature of interpleader filed by any person, firm, or corporation, association, or society having in his or its custody or possession money or property of the value of $500 or more, or having issued a note, bond, certificate, policy of insurance, or other instrument of value or amount of $500 or more, or providing for the delivery or payment or the loan of money or property of such amount or value, or being under any obligation written or unwritten to the amount of $500 or more, if
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> (1) Two or more adverse claimants, of diverse citizenship as defined in section 1332 of this title,

are claiming or may claim to be entitled to such money or property, or to any one or more of the benefits arising by virtue of any note, bond, certificate, policy or other instrument, or arising by virtue of any such obligation; and if (2) the plaintiff has deposited such money or property or has paid the amount of or the loan or other value of such instrument or the amount due under such obligation into the registry of the court, there to abide the judgment of the court, or has given bond payable to the clerk of the court in such amount and with such surety as the court or judge may deem proper, conditioned upon the compliance by the plaintiff with the future order or judgment of the court with respect to the subject matter of the controversy.

(b) Such an action may be entertained although the titles or claims of the conflicting claimants do not have a common origin, or are not identical, but are adverse to and independent of one another.

Section 1397, 28 U.S.C.:

Interpleader. Any civil action of interpleader or in the nature of interpleader under section 1335 of this title may be brought in the judicial district in which one or more of the claimants reside.

Section 2361, 28 U.S.C.:

Process and procedure. In any civil action of interpleader or in the nature of interpleader under section 1335 of this title, a district court may issue its process for all claimants and enter its order restraining them from instituting or prosecuting any proceeding in any State or United States court affecting the property, instrument or obligation involved in the interpleader action until further order of the court. Such process and order shall be returnable at such time as the court or

judge thereof directs, and shall be addressed to and served by the United States marshals for the respective districts where the claimants reside or may be found.

Such district court shall hear and determine the case, and may discharge the plaintiff from further liability, make the injunction permanent, and make all appropriate orders to enforce its judgment. As amended May 24, 1949, c. 139, § 117, 63 Stat. 105.

Rule 22, Federal Rules of Civil Procedure:

(1) Persons having claims against the plaintiff may be joined as defendants and required to interplead when their claims are such that the plaintiff is or may be exposed to double or multiple liability. It is not ground for objection to the joinder that the claims of the several claimants or the titles on which their claims depend do not have a common origin or are not identical but are adverse to and independent of one another, or that the plaintiff avers that he is not liable in whole or in part to any or all of the claimants. A defendant exposed to similar liability may obtain such interpleader by way of cross-claim or counterclaim. The provisions of this rule supplement and do not in any way limit the joinder of parties permitted in Rule 20.

(2) The remedy herein provided is in addition to and in no way supersedes or limits the remedy provided by Title 28, U.S.C., §§ 1335, 1397, and 2361. Actions under those provisions shall be conducted in accordance with these rules. As amended Dec. 29, 1948, eff. Oct. 20, 1949.

STATEMENT OF CASE

This action in the nature of interpleader was instituted under 28 U.S.C. §§ 1335, 1397 and 2361 and Rule 22(2) of the Federal Rules of Civil Procedure in the United States District Court for the Southern District of Florida on January 2, 1964 (I. 1a), transferred to the Northern District of West Virginia on March 31, 1964 (I. 87a) and dismissed by the latter on December 14, 1964 (I. 143a).

In essence the litigation was the renewal of an attempt by petitioner Mrs. Kelly, a citizen and resident of the state of Florida, and the utilities she controls to have judicially determined a long-standing dispute between her and respondent, a citizen and resident of the state of West Virginia, which has continued since their divorce in 1955. The principal issue sought to be resolved was which parent was legally empowered to exercise control over shares of stock in a family-owned utility enterprise held by or for two of their minor children, Richard Greer Raese and John Reeves Raese. In addition, the complaint sought the recovery of damages for injuries caused by respondent to the utility business.

The complaint (I. 10a) alleged that adverse claims relating to the childrens' shares and to cash dividends declared and paid with respect to their interests stemmed on the one hand from the divorce action which Mrs. Kelly instituted in the state of Florida[3] wherein custody of the children and guardianship over their property was by amended final decree given to

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[3] *Raese* v. *Raese*, Circuit Court of Dade County, Florida, In Chancery, No. 175839.

her (I. 41a)[4] and on the other hand from letters of guardianship respondent obtained from a West Virginia court.[5]

Prior to 1960 the assets of the utilities were divided among three West Virginia corporations, which were named as defendants in this action: Preston County Supply Company ("Supply"), which had issued and outstanding 2471 shares of capital stock, Preston County Light and Power Company ("Power"), and Preston County Telephone Company ("Telephone"). Supply owned all the outstanding shares of Power and Telephone.[6] Mrs. Kelly was undeniably in control of Supply and its subsidiaries by reason of her ownership outright of nearly 70 percent (1,717) of Supply's outstanding shares. The remaining shares of Supply were distributed among her two children, Richard and John, who owned 450 and 300 shares, respectively, the respondent who owned 1 share, and Mrs. Kelly's mother, Agnes J. Reeves Greer, who owned 3 shares.

In March, 1960, shortly after Preston was organized and changes in the powers and policies of the West Virginia corporations were initiated to accommodate expected expansion in the operations of the utilities

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[4] The Florida court order was implemented, upon respondent's refusal to comply, by cancellation of the certificates in his possession and reissue of the childrens' shares to Mrs. Kelly as trustee, subject to further order of the court (I. 44a, 50a).

[5] The circumstances of the issuance of the letters of guardianship have not been pleaded but appear in a complaint he filed in the state of West Virginia which was incorporated as an exhibit to the complaint in this action (II. 30b).

[6] Possible dispute as to the ownership of three shares of Power is not involved in this action.

to meet competitive conditions, respondent, as the owner of one share of Supply, and purporting to act as guardian of his children's shares[7] instituted a state Court action in West Virginia, against Mrs. Kelly, Supply and Power, *inter alia,* to dissolve the West Virginia corporations and he obtained *ex parte* orders therein restraining the companies from adopting or acting under approved amendments and resolutions which remained in effect for nearly three years. (I. 21a-22a). The harassment which predated respondent's suit has continued with few interruptions to the present time.

Personal service in the state court action was not made on all the persons joined as defendants, and in particular not on Mrs. Kelly. To effectively resolve the adverse claims, an action in the nature of interpleader was instituted in the United States District Court for the District of Delaware by Supply and Preston (to which Mrs. Kelly had transferred the stock she held in Supply individually and as trustee for her children) (P.A. 14a, 22a). Both of these actions remained stagnated for nearly three years[8] until their dismissal with prejudice pursuant to a stipulation under the terms of an overall settlement made

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[7] Jurisdiction to maintain the action required assertion of ownership of at least 20 percent of the outstanding stock of the corporation. W. Va. Code, c. 31, Art. 1, § 81.

[8] During that long interval while the Delaware case was pending, forward progress was stymied by respondent's resistance to a determination of the issues on their merits. There, as in this case, he resorted to a motion to dismiss to avoid confrontation of the issues, a motion the federal court never acted on.

between Mrs. Kelly and her mother (I. 139a-142a)[9] But relief from the continuing harassment was temporary. In December, 1963, soon after the utility reorganization plan[10] had stockholder approval for transferring the assets of the West Virginia corporations to Public Service, respondent, notwithstanding dismissal of his state court action with prejudice, in essence renewed his suit in the same state court for dissolution of the West Virginia corporations as well as for alternative relief (I. 23a, II. 29b).[11]

Again, the state court did not have personal jurisdiction over Mrs. Kelly, and the instant suit was brought in which all the interested parties could be and were served under 28 U.S.C. 2361. In addition to resolving adverse claims respecting the interests in the childrens' shares of the utility properties, the action was brought to settle acknowledged conflicting claims over dividends which had been declared by Supply

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[9] Mrs. Greer's control of respondent's litigation was assured under the terms of the settlement agreement which has been the subject of protracted and intense litigation resulting from Mrs. Kelly's mother refusal to acknowledge its binding effect, and which has not yet been fully effectuated. See *Kelly* v. *Greer*, 354 F.2d 209 (C.A. 5, 1965); 334 F.2d 434 (C.A. 3, 1964); 365 F.2d 669 (C.A. 3, 1966), certiorari denied 385 U.S. 1035 (1967). For related proceedings, see *Kelly* v. *Greer*, 295 F.2d 18 (C.A. 3, 1961) and *Kelly* v. *Greer Steel Co.*, 309 F.2d 786 (C.A. 6, 1962).

[10] Under its terms, all of Public Service's shares were to be held by Preston and Preston would have issued and outstanding 9,983 shares to the authorized owners of the shares of Supply in substantially the same ratio as the number of shares each owned in Supply bore to the total number of Supply's shares outstanding.

[11] Demand in the alternative was also made for a money judgment of the value of the shares and the appointment of a receiver of the utilities.

prior to the reorganization[12] and a claim Mrs. Kelly was asserting against the small stock interest respondent owned in his own right.

Concurrently with the commencement of the action Preston deposited with the court stock certificates representing the proportionate interests of the children in the utility business alleged to be represented by 3,030 shares of Preston, a certified check in the sum of $2,253 covering the exact amount of dividends paid out by Supply which are in dispute[13] and a certificate representing the equivalent amount of respondent's individually owned interests (4 shares).[14] The claim

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[12] The dividends were declared by Supply, during the pendency of the interpleader action in Delaware. An attempt by plaintiffs to amend the complaint to permit resolution of the adverse claims to the dividends was denied by the federal court without prejudice.

[13] The Court of Appeals erroneously found that the dividends were not deposited with the district court although the docket entries clearly disclose such deposit. The error was called to the Court's notice in the petition for rehearing without effect.

[14] Upon institution of suit, petitioner corporations obtained an order restraining the commencement or further prosecution of other actions, including the dissolution suit in West Virginia. On March 5, 1964, while the action was still in the federal court in Florida, the injunction was dissolved without a hearing. The Florida court then transferred the case and files to the District Court in West Virginia although an appeal to the Fifth Circuit had been filed and was pending, thus effectively denying petitioners a right to pursue their appeal as a matter of right. The only alternative open to them—mandamus to the Fifth Circuit—was unsuccessful. Thereafter, the transferee court in West Virginia refused to schedule argument on petitioners' renewed motion which was filed on September 18, 1964 seeking restoration of the restraint against prosecution of the state court action upon a finding, again without the benefit of hearing, that the ground for its issuance had "more or less evaporated" by the time the West Virginia court had issued its November 13, 1964 opinion granting the dismissal motion (I. 148a). Petitioners' further application for an injunction pending appeal was dismissed on the ground that if granted it would "delay the facilitation of the case to its ultimate conclusion." (I. 148a)

for damages, mentioned above, is predicated on allegations of a series of acts of misconduct which have resulted in financial injury to the business and depleted its value as a going concern. These were alleged to have commenced in 1955 when respondent was involved in the management of the business.

Respondent filed no responsive pleading; the West Virginia corporations and Mrs. Kelly filed answers admitting the allegations of adverse claims. Additionally, Mrs. Kelly cross-claimed for a declaration under 28 U.S.C. § 2201(2) of the validity and effect of the state court decrees on which her claim as custodian and guardian of her children's persons and property was based and a declaration of her status as trustee of certificates representing the children's shares in the utility enterprises. She also sought enforcement of a money judgment entered against the respondent in the domestic relations proceedings, including execution thereof against the shares respondent owned individually, and moved for summary judgment thereon (I. 31a).

Respondent's opposition took the form of a series of motions to dismiss the complaint, to dissolve the injunction, alternatively to strike the portions of the complaint seeking damages against respondent personally, and for transfer of the action to the federal court in West Virginia (I. 57a-68a), to strike and quash the joint answer of the West Virginia corporations, to strike and quash and to dismiss Mrs. Kelly's answer, to dismiss or strike in part her cross-claim and to strike and quash her motion for summary judgment (I. 2a-3a, 71a-73a).

The transferee court's dismissal of the entire action was based on the state court's assumed prior juris-

diction of the controversy, an unwarranted conclusion that all issues between petitioners and respondent could be resolved in that court and its finding that Preston was in no real danger of suit from Mrs. Kelly. While it purported not to do so, the District Court, in affirming the dismissal, made findings on the merits that are without record support. Particularly damaging were its conclusions that the Florida divorce court acted *ex parte*, that the creation of the petitioner corporations were organized for impliedly improper purposes, and by its obvious determination (without resort to evidence) that respondent was the children's guardian and fiduciary, as appears from its findings that the orders of the Florida court were designed to "get" control of the children's property and that Mrs. Kelly's action was designed to "circumvent" the West Virginia law (I. 163a, 168a).

The Court of Appeals affirmed the District Court's decision 22 months after hearing argument on the appeal in which it approved the denial of "this attempt to bring this continuing internecine war in the District Court." (R. 35).

REASONS FOR GRANTING THE WRIT

The judgment of the Court of Appeals should be reviewed not just because it does violence to the basic purposes underlying the grant of interpleader jurisdiction to federal courts but more important because affirmance of the judgment of dismissal continues to deprive petitioners of their rights to a determination by a court of their choice of issues of fact and law which have been in dispute for many years.

As we show, the exercise of interpleader jurisdiction is not a matter of judicial discretion once juris-

dictional requisites have been met. In those circumstances a federal court may not, on casual assessment of the truth of the facts or on unproved pretexts, decline to accept a case in which adverse claims have been alleged respecting property deposited with a federal district court, where its refusal is obviously governed by disdain to entertain a controversy involving a much litigated and bitter family dispute. Unless review is allowed and the case remanded, first, for a determination of the fact whether adverse claims have been or will be asserted (if that question can indeed be raised in good faith) and, secondly, for a determination of which claims should prevail, it will not only encourage federal courts to drastically dilute their jurisdiction in diversity cases to those they wish or find it convenient to hear, but it will frustrate the purposes of the interpleader jurisdiction conferred on them by Congress and increase the number of suits not capable of definitive disposition—such as suits between persons all of whom are not subject to the jurisdiction of a local court. Thus the refusal of the courts to even call upon the respondent to file a pleading admitting or denying the allegations raises question whether basic rights of the petitioners who have sought a jury determination of their claims have been grossly abused.

It is significant that the respondent has, by resort solely to motions to dismiss, been successful in both this suit and the prior interpleader action (of which the instant action is substantially a continuation) in avoiding even the preliminary step of admitting or denying that he is asserting a claim to any of the interpleaded property. Long and costly periods of delay

and the almost invariable refusal of the courts[15] to entertain evidence of claimed rights or injury have been a recurrent theme throughout the history of this family litigation. The cumulative result of the decisions seems to establish the frightening doctrine that the federal courts may in diversity actions arising out of a family dispute prejudge the truths of the facts alleged merely upon a motion to dismiss. Such an approach to jurisdiction, no matter how couched not only is violative of basic private rights but is conducive to the creation of a precedent barring access to federal courts in matters the courts deem too distasteful to hear and dispose of on the merits.

Control of the Stakeholder by One of the Adverse Claimants Does Not Make the Interpleader Action Collusive.—Although the Court of Appeals acknowledged the existence of a *bona fide* dispute between Mrs. Kelly and the respondent Raese, it nevertheless affirmed the dismissal of the complaint on the expressed ground that it was collusively brought in Florida by the Delaware corporations to get *in personam* juris-

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[15] Of the numerous suits instituted in this family litigation, only one was decided after a hearing on the merits but the verdict for defendant (i.e., petitioner Mrs. Kelly) was reversed on appeal and remanded for a new trial. *Preston County Coke Co.* v. *Preston County Light and Power Co.*, 146 W.Va. 231, 119 S.E.2d 420 (1961). But even there judgment was entered for plaintiff upon remand upon motion for summary judgment. Mrs. Kelly has been consistently frustrated from obtaining a hearing on the merits in numerous actions: *Kelly* v. *Greer Steel Co.*, 309 F.2d 786 (C.A. 6, 1962); *Kelly* v. *Greer*, 334 F.2d 434 (C.A. 3, 1961), 365 F.2d 669 (C.A. 3, 1966), certiorari denied 385 U.S. 1035. A suit brought by her mother in a Florida state court in 1957 was dismissed by agreement of the parties this year without ever coming to trial, although it tied up very valuable real estate of Mrs. Kelly's the entire intervening period.

diction over respondent on other claims.[16] Since the allegations in a complaint must be taken as true upon a motion to dismiss, the inference of improper motivation cannot reasonably be drawn from the simple fact that the complaint joined a claim for damages against one of the adverse claimants with its request for a determination of adverse claims to property deposited with the court.

Even if, *arguendo,* the claim for damages was deficient on jurisdictional grounds, the impact of that fact upon the *bona fides* of an allegation that adverse claims were being asserted against property in court would seem highly irrelevant. Under such circumstances, a claim improperly joined with one sufficiently pleaded would alone be subject to dismissal. Respondent's motion to strike allegations upon which judgment for damages was sought which, if granted, would have left for decision solely the issue of adverse claims, was never acted upon by the court.

The conviction that the entire action was improperly founded seems to have its genesis in both the district

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[16] The District Court additionally relied on the prior pendency of the state court action contrary to this Court's holdings in numerous cases. See *Chicot County* v. *Sherwood,* 148 U.S. 529, 534 (1893); *McClellan* v. *Carland,* 217 U.S. 268, 282 (1910); *Kline* v. *Burke Construction Co.,* 260 U.S. 226 (1922); *Commonwealth Trust Co.* v. *Bradford,* 297 U.S. 613 (1936); *Markham* v. *Allen,* 326 U.S. 490 (1945); *England* v. *Louisiana State Board of Medical Examiners,* 375 U.S. 411 (1964). Also see *Liberty Mutual Insurance Co.* v. *Pennsylvania Railroad Co.,* 322 F.2d 963, 968 (C.A. 7, 1963); *Maryland Casualty Co.* v. *Glassell-Taylor & Robinson,* 156 F.2d 519, 525 (C.A. 5, 1946). Moreover, the clear language of 28 U.S.C. § 2361 is specifically empowering federal courts to restrain the institution *or* prosecution of any action (federal or state) affecting the property involved in the interpleader action emphasizes the importance of protecting the court's interpleader jurisdiction. *Treinies* v. *Sunshine Mining Co.,* 308 U.S. 66 (1939).

and appellate courts' complete reliance on *Bierman* v. *Marcus,* 246 F.2d 200, (C.A. 3, 1957), certiorari denied 356 U.S. 933 (1958). In focusing upon *Bierman* as the mainstay for their support, both courts unrealistically equated collusion to the absence of fear of exposure by a stakeholder to double liability or to prosecution *by its controlling stockholder.*

Examination of the facts in that case lends no logical support to such conclusion. In *Bierman,* where the controlling stockholder sought to implead a corporation he controlled and a former controlling stockholder to determine rights in a fund plaintiff had deposited with the court, it was found on the facts *after extended hearings* that the corporation was *not* claiming the fund adversely or otherwise. In this case, there has been neither hearing nor even a formal denial of the existence of adverse claims. The presence of collusion can only be determined upon a finding of fact that there is no *bona fide* dispute. In reaching its conclusion that the action in *Bierman* was not brought in good faith, the Third Circuit noted that it took four years before either defendant filed an answer to the complaint and when they did neither of them claimed the fund, stating (at p. 202): "Hearing disclosed no dispute between the original defendants over the interpleaded funds." The Third Circuit relied on responsive pleadings and factual evidence to reach its conclusion, not by looking behind the allegations of adverse claims made in a complaint.

It is obviously the absence of disputing claims over property which is interpleaded and not the mere fact of control of the stakeholder by one of the adverse claimants that governed the Third Circuit's decision. See *United Benefit Life Insurance Co.* v. *Katz,* 155

F. Supp. 391, 393 (E.D. Pa. 1957). Such control might well be irrelevant as a source of vexatious litigation or threats thereof. Control alone has not been a bar to the maintenance of interpleader. *Toledo* v. *Toledo Ry. and Light Co.*, 259 Fed. 450 (C.A. 6 1919); *St. Louis Southwestern Railway Co.* v. *Meyer*, 364 Mo. 1057, 272 S.W. 2d 249 (1954), appeal dismissed, 349 U.S. 942 (1955).

A basic purpose for invoking interpleader jurisdiction is to avoid the harrassment of litigation and to resolve in a single action the validity of adverse claims which are found to be asserted in good faith. The statute is remedial and to be liberally construed. *Sanders* v. *Armour Fertilizer Works*, 292 U.S. 190, 198 (1934). As stated by Judge Maris (now on the Third Circuit bench) in *Metropolitan Life Ins. Co.* v. *Segaritis*, 20 F. Supp. 739 (E.D. Pa. 1937), at p. 741:

> [I]t thus becomes clear that the jurisdiction of this court to entertain an interpleader bill does not depend upon the validity or even bona fides of the claims of the respective defendants. It is obvious that in almost every case the claim of one of the parties will ultimately be determined to be invalid. That, however, is a matter for determination at the trial and cannot affect the jurisdiction of the court.

It would seem naive to conclude that the hazard of litigation does not exist because of Mrs. Kelly's control of Preston, except upon the wholly unrealistic premise that she will forever refrain from asserting her claims in opposition to those of the respondent. It is a fundamental principle of interpleader that its office is not so much to protect a party against double liability as against double vexation in respect of one

liability. *National Fire Ins. Co.* v. *Sanders,* 38 F.2d 212, 214 (C.A. 5, 1930).

Admittedly abject surrender by one litigant will effectively eliminate the hazard of a multiplicity of suits but the history of the litigation between the adverse claimants here emphatically indicates that dismissal will increase rather than diminish the number of suits involving the very issues sought to be resolved in this action. Since 1960 four separate suits have been instituted involving the children's shares; two of them also relate to the dividends. Respondent furthermore has intervened in state public service commission proceedings on grounds which would be determined in the interpleader action. Thus, one of the distinctive purposes of interpleader, the termination of present and the avoidance of further vexatious litigation between the disputing parties (not between one of them and the stakeholder she controls) was improperly denied by the court's refusal to take jurisdiction of the action.

The Courts Below Were Improperly Influenced by by Evaluations of the Merits of the Controversy Which Were Reached Without Benefit of Responsive Pleadings, Affidavits, or Evidence.—Despite declarations to the contrary, the decisions of both the District Court and the Court of Appeals contained findings of fact upon the merits of the allegations in both the complaint and cross-claim which must be recognized as having influenced their decisions. Both overlooked or deemed inconsequential the requirement that motivations of the petitioners or the *bona fides* of their claims or truth of the allegations are not soluble on a motion to dismiss. The prejudgment is self evident: the Court

of Appeals found that the joinder of a large claim for damages against respondent "[t]hough not suspect in itself" nevertheless made the entire action one which "does not bear close scrutiny." Whatever doubt the Court might have held in reserve at that stage of examination seems to have been completely dissipated by the cross-claim which made the action (in the Court's opinion) further suspect as one seeking a declaratory judgment of the validity of the *res* which was deposited with the district court. Thus the existence of interpleader jurisdiction was determined on a casual prejudgment of the motives behind the suit as read into the facts alleged and the relief sought by the complaint and cross-claim, and not upon the statutory provisions which were met for interpleader jurisdiction: diversity of citizenship and allegations of adverse claim to money or property of a statutory amount and its deposit with the court. 28 U.S.C. § 1335.

It has been the settled rule that the only question to be decided on a motion testing the validity of a complaint in interpleader or in the nature of interpleader is whether the essential jurisdictional facts have been alleged. *Railway Express Agency, Inc.* v. *Jones,* 106 F.2d 341, 344 (C.A. 7, 1939); *Roberts* v. *Metropolitan Life Ins. Co.,* 94 F.2d 277, 280 (C.A. 7, 1938), certiorari denied, 303 U.S. 660 (1938). Diversity and the deposit of a statutory *res* have not been challenged. Thus, it is elementary that the truth of allegations of adverse claims and hence a determination whether interpleader has been properly brought can only be tested by a traverse pleading, not by motion, argument of counsel or divine perception. Contrary to the views held by both courts below, interpleader jurisdiction conferred on federal courts is not

within their discretion to accept or reject. *Meredith* v. *Winter Haven,* 320 U.S. 228, 234 (1943); *Markham* v. *Allen,* 326 U.S. 490 (1946); *England* v. *Louisiana State Board of Medical Examiners,* 375 U.S. 411, 415 (1964). Access to the federal courts extends as well to the judicial settlement of an "internecine war" (R. 35)[17] between former partners to a marriage as it does to any "war" between unrelated litigants. Divorce does not relegate its participants to a status of second-class citizenship.

Nor is the Court's doubt as to the validity of the *res* on deposit a justifiable ground for dismissal of the action. Until it is otherwise established as fact, the character of the *res* is determined by the complaint, not by collateral contentions or inferences. As stated in *Wertheimer* v. *Bank of Nova Scotia,* 140 F. Supp. 950 (S.D. N.Y. 1956), at p. 953:

> The fact that defendant proposes to deposit certificates of stock and not the sum which the plaintiff demands in his complaint [money damages for conversion], does not require denial of the motion for leave to make the deposit. It is that which the alleged stakeholder has in his custody or possession which is required to be deposited with the Clerk of the Court under the interpleader statute * * * [P]laintiff requests that the court, in lieu of the deposit of the stock, order its sale or direct the defendant to consent to a sale, the proceeds to be deposited with the court. To grant this request, assuming power to do so, would in effect recognize plaintiff's claim to the shares and disregard [the opposing] claim—the very issue to be decided—but not on this motion

[17] The words are those of the Court of Appeals (App., *infra,* p. 2a).

which, as already noted, is a preliminary to an application for interpleader relief.

Wertheimer was expressly approved in *Douglas-Guardian Warehouse Corporation* v. *Ramy Seed Co.*, 271 F.2d 24 (C.A. 8, 1959) where the court stated, at p. 27:

> [I]t is that which the person who invokes interpleader asserts is the subject matter of the conflicting claims and which is in his possession that determines what is to be deposited in court.

It was improper to consider preliminarily whether adverse claims were being asserted over equity interests in a utility enterprise or to different evidences of title which the adverse claimants might contend represent those interests. In posing the problem and suggesting that it might be a ground to defeat jurisdiction, the Court ignored the fact that the deposited shares had their origin in certificates issued by Supply, (although common origin of the disputed claims has not since the interpleader statute was amended in 1926 been a requirement for maintaining a suit in interpleader). As stated in the *Douglas-Guardian* case:

> It is not ground for objection to the joinder that the claims of the several claimants or the titles on which their claims depend do not have a common origin or are not identical but are adverse to and independent of one another, or that the plaintiff avers he is not liable in whole or in part to any or all of the claimants.

It seems genuinely unrealistic to suggest that respondent is asserting no claim to the Preston certificates into which the Supply shares have been trans-

formed since the dispute is unquestionably over the property interests they represent.

Moreover, all these reservations about the identity of the property in dispute were rendered insignificant by the deposit of a certified check representing the Supply dividends. This alone provided indisputable subject matter for interpleader jurisdiction. And a determination of the right to those dividends will fully resolve the dispute over the shares. The Court of Appeals did not face the question since it failed to accept the fact of such deposit and ignored it when its erroneous finding was called to its attention in the petition for rehearing.[18]

This Case Should be Considered With a View to its Remand to Resolve All the Issues Raised or to be Raised by the Pleadings.—To avoid a stalemate of the resolution of the conflicting claims and a denial of due process attendant upon the refusal of the federal courts to hear and decide a dispute which has been in existence for more than 10 years and which have been (with one slight interruption) in litigation since 1960,

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[18] The petition for rehearing stated, in part (R. 53):

> "• • • there can be no ignoring of the fact that dispute exists over the cash dividends declared and paid on the equity interests, and this Court's finding that no cash was paid into court is patently in error. It clearly appears from the docket entries that a receipt was given by the district court for stock certificates '(and dividends in the amount of $2,253.00).' (Appellants' App. p. 1a)."

The trial court ignored the dividend deposit except to state that the complaint sets up as the property in controversy "the Preston shares and dividends paid by Supply". The erroneous conclusion of the Court of Appeals might be predicated on the order of the Florida District Court transferring the action which flatly stated that the "stock has been deposited in the registry of the court but the dividends were not so deposited." (I. 89a).

the case should be remanded for a full and final determination without further delays of all the issues raised by pleadings in response to the complaint and cross-claim, including the claims asserted against respondent personally.

There can no longer be a basis for respondent to claim immunity from the court's jurisdiction. After service of process upon all the defendants pursuant to the provisions of 28 U.S.C. § 2361, respondent elected to appear and defend on the merits as reflected by 42 separate docket entries made prior to issuance of the transfer order (I. 1a-4a). Among his affirmative steps included an attack on the court's jurisdiction over his person, objection to the venue, his assertion of equitable defenses and his challenge of Mrs. Kelly's cross-claim for declaratory judgment (I. 57a-68a, 71a-73a). His appearance in the action and the degree of his participation clearly constituted a submission to *in personam* jurisdiction. How many years can a claim that an adverse interest exists with respect to deposited property be resisted in the federal courts by a party's employing purportedly defensive motions without subjecting that party to the court's *in personam* jurisdiction? In *Merchants Heat & Light Co.* v. *Clow & Sons,* 204 U.S. 286 (1907), this Court said, at p. 290:

> There is some difference in the decisions as to when a defendant becomes so far an actor as to submit to the jurisdiction, but we are aware of none as to the proposition that when he does become an actor in a proper sense he submits.

There would seem to be little ground for asserting that he did not become such an actor but assuming

arguendo that the degree of his participation prior to transfer did not constitute submission, the act of moving for a change of venue was a consent to appear generally to contest the action on its merits. In *Hill* v. *Upper Mississippi Towing Corporation,* 141 F. Supp. 692, 694 (D.C. Minn. 1956) a motion made under 28 U.S.C. § 1404(a) was held to be a consent to make a general appearance to contest the action on the merits and a waiver of objections to venue and jurisdiction.

In addition, the character of respondent's objections —pendency of the state court action and the good faith of petitioners—were equitable defenses subject to waiver by him, *McGowan* v. *Parish,* 237 U.S. 285, 295 (1914) and waived by his multi-faceted motions which resulted in transfer and the denial *sub silentio* of his equitable defenses. Since a federal court may not question jurisdiction on equitable grounds *sua sponte* where consent to jurisdiction has been given, *Levinson* v. *United States,* 258 U.S. 198, 200 (1921), respondent could not again urge the same grounds in support of his motion to dismiss in the transferee court. The transferor court, moreover, in granting the motion to transfer necessarily acknowledged that it had subject matter jurisdiction of the action, since such jurisdiction is a required ingredient of transfer power. *First National Bank of Chicago* v. *United Air Lines,* 190 F.2d 493 (C.A. 7, 1951), reversed on other grounds 342 U.S. 396 (1952). Process on all claimants having been issued under 28 U.S.C. § 2361, the District Court had no discretion but to assume jurisdiction to "hear and determine the case". 28 U.S.C. § 2361.

Furthermore, neither court below considered in these circumstances whether either of petitioners' claims

could be maintained after transfer independent of interpleader jurisdiction. *Elliott* v. *Federal Home Loan Bank Board,* 233 F. Supp. 578, 588 (S.D. Cal. 1964). Jurisdictional defects which might have been inherent in the action prior to transfer no longer presented a bar to the maintenance of either claim when they were transferred to the district of respondent's residence by his own voluntary act.

The dismissal of both claims without regard to the flexibility for the speedy disposition of claims contemplated by the federal rules constituted an abuse of discretion since the form in which they were couched was no ground for avoiding deciding them on the merits. The rules were designed and intended to be construed "to secure the just, speedy, and inexpensive determination of every action." *Foman* v. *Davis,* 371 U.S. 178, 181-182 (1962); *Provident Security Life Ins. Co.* v. *Gorsuch,* 323 F.2d 839 (C.A. 9, 1963), certiorari denied, 376 U.S. 950 (1964).

What occurred here is the antithesis of that envisaged by Mr. Justice Goldberg in *Foman* as to the proper role of the federal rules. It has delayed attempts initiated more than six years ago to obtain a court decision on the merits, and seeks to impose, in addition to the heavy expenses of litigation petitioners have already suffered, further expenses in litigation in a state court which has no jurisdiction over Mrs. Kelly that cannot be decisive of the issues raised in this action. Not only does the judgment presage further delays and further expense but it poses grave question whether the petitioners can ever obtain a hearing in a federal court where they have a statutory right to have the issues resolved. If the trial court is directed

to assume jurisdiction and hear and determine the case, full and final relief can be accorded the parties within the intendment of the interpleader statutes.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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